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MICHAEL BODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., AND
CHRONICLE PUBLISHING Co., *Petitioners,*

v.

OLIVIA NIEMI, A MINOR BY AND THROUGH
HER GUARDIAN AD LITEM, *Respondent.*

**BRIEF AMICUS CURIAE OF
NATIONAL ASSOCIATION OF BROADCASTERS IN
SUPPORT OF PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, FIRST APPELLATE DISTRICT**

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This brief is submitted on behalf of the National Association of Broadcasters ("NAB"), as *amicus curiae* in support of the petition for certiorari sought by Petitioner, National Broadcasting Company, Inc.

CONSENT OF THE PARTIES

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are being filed with the Clerk of this Court.

**OPINIONS BELOW. JURISDICTION
AND STATEMENT OF THE CASE**

NAB adopts the material set forth in the equivalent sections of the Petition for Certiorari.

QUESTION PRESENTED

Do the First and Fourteenth Amendments to the United States Constitution permit the imposition by a state of tort liability on the broadcaster of a dramatic work, on the theory that the broadcaster was "negligent" or "reckless" in presenting the drama because viewers or others might imitate a scene in the drama and commit criminal acts resulting in injury?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

INTEREST OF AMICUS CURIAE

The National Association of Broadcasters is a non-profit, incorporated association of radio and television broadcasters with a membership which includes 556 television stations, 2550 AM radio stations, 1924 FM radio stations and the major nationwide commercial broadcast networks. NAB is committed to the advancement of broadcast customs and practices which further

the public interest, and to the maintenance of the guarantees of freedom of expression embodied in the First Amendment.

NAB submits this brief *amicus curiae* because it believes that the novel tort of "imitation" fundamentally impairs the First Amendment's guarantees of freedom of expression and that its recognition poses a threat of inhibition which sweeps across virtually the entire range of creative expression, including broadcast programming.

ARGUMENT

The tort theory urged by Plaintiff, upon which the California Court of Appeal has ordered a jury trial to be held, amounts, most narrowly, to the proposition that the broadcaster of a dramatic work is liable for civil damages if imitation of some aspect of that work is foreseeable, occurs, and results in injury. More broadly, Plaintiff's theory and the Court of Appeal's ruling create the prospect that civil liability may attach based on the depiction of any act whose imitation might result in injury. The decision of which review is sought contemplates that such liability might be proven under the imitation theory "despite First Amendment protections" (141 Cal. Rptr. at 514).

The chilling effect on the broadcast media of this Court's failure to review and reverse such a decision would be inestimable. A wide range of broadcast programming, from dramatic works to documentaries, may be imitated in some aspect, by some portion of the audience, in some manner which may result in injury. Commentaries portraying topics of social concern would be particularly vulnerable to claims based on imitation—and to inhibition because of the recogni-

tion of that tort. Virtually no category of programming, however, from historical drama (such as "Roots") to situation comedy (such as "All in the Family") would be exempt from the risk of sanctions or the self-imposed censorship which the tort of imitation would impose.

It is beyond peradventure that California could not impose criminal penalties on such a broad range of expression; neither may it limit such expression through novel concepts fashioned under civil tort law. *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964).¹

The First Amendment embodies the judgment that the freedom of expression essential to a democratic society may not be limited or suppressed simply because the ideas or information conveyed might be misused. "It is precisely . . . [the] choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). The decision of the California Court of Appeal ignores—all but reverses—that fundamental judgment and mandates, instead, that a jury determine whether expression may result in liability "despite First Amendment protections". Unless reviewed by the Court, such a stark rejection of First Amendment principles will pose a real and substantial threat to the vitality of all broadcast programming.

¹ This Court recognized in *Sullivan* itself that "[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute," and accordingly held that "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." (376 U.S. at 277).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

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